Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NO. 93-1380

A.J. ARAVE, WARDEN,

Petitioner,

v.

ALBERT RAY BEAM,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[SUPREME COURT RULE 15]

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review, as framed by the Petitioner, are as follows:

1. Whether the Court of Appeals for the Ninth Circuit impermissibly limited the applicability of a procedural bar to habeas review of a death sentence by holding that the Idaho Supreme Court implicitly considered an Eighth Amendment issue not presented to it?

2. Whether the Court of Appeals for the Ninth Circuit failed to accord the presumption of correctness mandated by 28 U.S.C. §2254(d) to a state court judgment by holding that the state sentencing judge arbitrarily applied the defendant's sexual history to the sentencing decision?

3. Whether the Court of Appeals for the Ninth Circuit improperly devised a "new rule" and applied it retroactively in violation of *Teague v. Lane*, 489 U.S. 288 (1989) by holding that a sentencing court may not consider aspects of a defendant's "sexual history" and by holding that certain sexual behavior is within the protection for primary private conduct afforded by an exception to the non-retroactively doctrine of *Teague*?

The Respondent adds the following issue for consideration by this Court:

4. Whether the Petitioner is precluded from bringing this Petition for a Writ of Certiorari due to its procedural default in failing to file a timely and legally sufficient "Amended Petition for Rehearing and Suggestion for Hearing *En Banc*" with the Ninth Circuit Court of Appeals?

INTERESTED PARTIES

1. *For Respondent - Defendant* *

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* Both counsel were appointed to represent the Respondent by the District Court, and this representation has continued through the appellate process to the Ninth Circuit and this court. Both counsel continue to jointly represent the Respondent before this court, even though David Skeen is designated as counsel of record.

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1. Whether the Petitioner is precluded from bringing this Petition for a Writ of Certiorari due to its procedural default in failing to file a timely and legally sufficient "Amended Petition for Rehearing and Suggestion for Hearing *En Banc*" with the Ninth Circuit Court of Appeals?

2. Whether the Court of Appeals for the Ninth Circuit impermissibly limited the applicability of a procedural bar to habeas review of a death sentence by holding that the Idaho Supreme Court implicitly considered an Eighth Amendment issue not presented to it?

3. Whether the Court of Appeals for the Ninth Circuit failed to accord the presumption of correctness mandated by 28 U.S.C. §2254(d) to a state court judgment by holding that the state sentencing judge arbitrarily applied the defendant's sexual history to the sentencing decision?

4. Whether the Court of Appeals for the Ninth Circuit improperly devised a "new rule" and applied it retroactively in violation of *Teague v. Lane*, 489 U.S. 288 (1989) by holding that a sentencing court may not consider aspects of a defendant's "sexual history" and by holding that certain sexual behavior is within the protection for primary private conduct afforded by an exception to the non-retroactively doctrine of *Teague*?

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondent-Defendant, Albert Ray Beam, [hereinafter referred to as the "defendant"] responds to the Petition by the Petitioner-State of Idaho, [hereinafter referred to as the "state"] to correct the erroneous recitation of the record as stated by the State of Idaho and to request that this court deny the Petition for the reasons set forth below.

OPINION OF THE NINTH CIRCUIT

On remand from the Supreme Court, the Ninth Circuit again affirmed the defendant's conviction and again vacated his death sentence. *See* Beam v. Paskett, (Beam II), 3 F.3d 1301 (9th.Cir.1993).

STATEMENT OF JURISDICTION

United States District Court Jurisdiction. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 2254, Rule 1, and 28 U.S.C. § 2241(c).

Ninth Circuit Court of Appeals Jurisdiction - Beam II. The jurisdiction of the Ninth Circuit Court of Appeals was invoked pursuant to 28 U.S.C. § 2253; FRAP, Rule 4(a)(1); and 28 U.S.C. § 1291. The Respondent-Defendant disputes that the Petitioner-State of Idaho had properly invoked the jurisdiction of the Court of Appeals regarding the filing of its Petition and Amended Petition for Rehearing and Suggestion for Hearing *En Banc*.

United States Supreme Court Jurisdiction - Beam II. The jurisdiction of the Supreme Court was invoked by the Petitioner pursuant to 28 U.S.C. §1254(1). The Respondent-Defendant disputes that the Petitioner-State of Idaho has properly invoked the jurisdiction of the Supreme Court regarding the filing of its Petition for Writ of Certiorari.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Eighth Amendment, U.S. Constitution:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

Fourteenth Amendment, U.S. Constitution:

> "SECTION 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

*Idaho Code, §19-2515(f)(5), (6) and (8):**

> (f) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:
>
> (5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.
>
> (6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.
>
> (8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

* Idaho Code, §19-2515(g) formally was numbered (f) at the time of the Respondent's sentencing in March, 1984. All references in this document shall contain citation to the former (f) statute.

STATEMENT OF THE CASE AND FACTS

Idaho State Trial Court. The facts of the offense were summarized by the Idaho Supreme Court on direct appeal in State v. Beam, 109 Idaho 616, 710 P.2d 526 (1985), *cert. den.* 106 S.Ct. 2260 (1986).

Prior to trial, the *State* made a motion to impanel two juries and simultaneously hear the cases of both the defendant and the co-defendant, Michael Scroggins. The trial judge deferred a ruling on the motion. At a

subsequent court appearance, the defendant's counsel inquired about the status of the state's dual jury motion, and requested that the court clarify its position. The court then advised counsel that two juries would be empaneled. The defendant made a motion inquiring as to whether the trial judge had ordered a severance as was contemplated by the Idaho Rules of Criminal Procedure. The trial judge stated that the cases were severed, and that the two separate jury's, sitting simultaneously, would hear from witnesses being offered in both cases. The trial judge stated the two purposes of this ruling as being (1) judicial economy and (2) the Bruton rule[1]. The trial judge reserved the right to determine what testimony would be presented to each jury. Using this experimental procedure, Jury "A" was empaneled to hear the Beam case and Jury "B" was empaneled to hear the Scroggins case. The defendant's repeated objections to the experimental dual jury trial were overruled.

The defendant was convicted as charged, after which an aggravation and mitigation hearing was held by the trial judge who fixed the sentence at death.

Idaho State Supreme Court. Following conviction and sentencing by the trial court, a timely appeal was taken to the Idaho Supreme Court. In addition to various grounds for relief asserted by the defendant in this appeal, the Idaho Supreme Court also conducted a mandatory proportionality review in accordance with I.C. §19-2827. The conviction and sentence were affirmed. *See* State v. Beam, 109 Idaho 616, 710 P.2d 526 (1985), *cert. den.* 106 S.Ct. 2260 (1986).

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[1] Bruton v. United States, 391 U.S. 128, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

State Post-Conviction Relief. The defendant then sought post-conviction review in the state district court by filing a Petition for Post-Conviction Relief and an Idaho Criminal Rule 35 motion to reduce his sentence. The trial judge denied both motions.

The defendant filed a timely Notice of Appeal for all issues to the Idaho Supreme Court, which denied relief. *See* State v. Beam, 115 Idaho 208, 766 P.2d 678 (1988), *cert. den.* 476 U.S. 1153 (1989).

The defendant then filed a Petition for Rehearing. The Idaho Supreme Court issued a summary order, without comment, denying the petition for rehearing on December 30, 1988. One justice dissented, arguing that it was legally unsound for the Court *not* to reconsider the defendant's sentence in light of the actions and views of the trial judge in the Scroggin's case, *and considering the views of police officers who believed the defendant was less culpable than the co-defendant, Scroggin's.*

United States Certiorari Petition. The defendant then filed a petition for writ of certiorari and a stay of execution with the United States Supreme Court, both of which were denied. *See* State v. Beam, 476 U.S. 1153 (1989).

Federal Petition for Writ of Habeas Corpus. On April 17, 1989, the defendant filed a Petition for a Writ of Habeas Corpus with the United States District Court for the District of Idaho. On July 30, 1990, the District Court issued an Order and Memorandum of Opinion denying the Petition for a Writ of Habeas Corpus. *See* Beam v. Paskett, 744 F.Supp. 958 (Dist.Idaho, 1990). A timely notice of appeal was filed on August 8, 1990.

Ninth Circuit Court of Appeals Decision - Beam I. The Ninth Circuit affirmed the conviction but reversed the death sentence. *See* Beam v. Paskett, (Beam I), 966 F.2d 1563 (9th Cir.1992). In so ruling, the court did not

make a decision on other issues argued by the defendant since it reversed on other grounds.

In reversing the death sentence, the Ninth Circuit held that the "utter disregard" aggravating factor in Idaho Code §19-2515(f)(6) was unconstitutionally vague. The court did not, however, decide whether the provisions of Idaho Code §19-2515(f)(5) or (8) were vague. This result undoubtedly occurred due to the court's vacation of the death sentence based on other grounds. *See* Beam v. Paskett, 966 F.2d at 1567.

As to the issue of the use of the dual jury at trial, the Ninth Circuit held the defendant may relitigate this issue if the State reimposes the death penalty upon remand.[2] *See* Beam v. Paskett, 966 F.2d at 1567 fn. 2. A reversal of the Ninth Circuit's decision will simply lead to more district court litigation and more appellate review.

United States Supreme Court. The Supreme Court vacated and remanded the Ninth Circuit decision for further consideration in light of Arave v. Creech, 113 S.Ct. 1534 (1993).

Remand to the Ninth Circuit - Beam II. After the Supreme Court vacated and remanded for reconsideration, but prior to the time the Ninth Circuit took any substantive action, counsel for the defendant filed a "Motion to Reinstate and Modify Decision". The Ninth Circuit denied this motion declaring its intent to act shortly pursuant to the order of remand.

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[2] The Ninth Circuit explained that it had never before considered this question in the context of a capital case, and did not need to determine if a dual jury in a capital case would be the ground for invalidating the conviction since the defendant's death sentence was vacated on other grounds. *See* Beam v. Paskett, 966 F.2d at 1567.

After the Ninth Circuit issued its opinion on September 2, 1993, again reversing the defendant's death sentence, the State attempted to file a Petition for Rehearing and Suggestion for Rehearing En Banc on September 15, 1993. However, the state mailed the Petition to the wrong counsel. The Corrected Certificate of Mailing states the defendant's counsel of record were served by mail in September 20, 1993. In actual fact, the postmark on the envelope was dated September 21, 1993, by the state's own postage meter. *[See App. 1]* The defendant objected to the untimely service by letter dated September 23, 1993, to the Clerk of the Ninth Circuit. The next day, the court directed counsel for the defendant to file a response to the state's Petition. This Response was mailed in a timely manner on October 7, 1993, and in addition to other arguments, counsel for the defendant again argued that the state had failed to file the petition in a timely fashion. The state never responded to this argument.

On November 16, 1993, the Court of Appeals filed an Order and Amended Opinion. The Order amended several technical aspects of the September 2nd Opinion but did not change the decision. The "Opinion" filed on November 16th was merely the September 2nd Opinion updated with the November 16th technical amendments.

On November 17, 1993, the state filed an "Amended" Petition for Rehearing and Suggestion for Rehearing En Banc. By letter dated November 22, 1993, the defendant declined to file a new response and advised the court it was relying on the previous response filed October 7, 1993. In addition, the defendant advised the Court of Appeals that the state had merely retyped its earlier petition for rehearing and resubmitted it. It was, and is, the defendant's position that only technical changes were made to the September 2nd opinion

in the Ninth Circuit's Order dated November 16, 1993, and that the state's Amended Petition, which itself was not changed, reflects this fact.

The Court of Appeals denied the Petition for Rehearing and rejected the Suggestion for Rehearing *En Banc* by Order dated December 6, 1993. No active judge of the Ninth Circuit requested a vote on the suggestion for rehearing en banc.

On December 7, 1993, the Court of Appeals filed an Order stating that the Opinion filed on November 16, 1993, was amended with two technical changes relating only to citations.

Importantly, the Court of Appeals also ruled that the state had defaulted with respect to is Amended Petition. *See* Beam v. Paskett, (Beam II) 3 F.3d 1301, 1312 (9th.Cir.1993). The court noted that "[T]he only difference between the amended petition and the original petition is a single paragraph on why Herndon v. Lowry is a 'new rule'." *Id.* The Court of Appeals then noted that the "paragraph on Herndon relates to the court's original opinion, not to its amended opinion". *Id.* The Court of Appeals then concluded that "[B]ecause Respondent-Appellee failed to include the argument in its original petition, we will not permit it to be made in a subsequent petition". *Id.*

State's Current Petition for Certiorari. The Petitioner-State of Idaho's primarily argues that the Court of Appeals reversed the defendant's death sentence based on the allegedly erroneous consideration of the defendant's "sexual history". The merits of this position are discussed below, but such a statement ignores the Ninth Circuit's reservation of the dual jury issue for future consideration should the defendant be resentenced to death and several other matters mentioned in the Ninth Circuit's opinion.

Why the state persists in prolonging the re-sentencing in this case is unknown. This case deserves to be resolved expeditiously and with finality. The defendant urges this court to deny the state's Petition for Certiorari so that the issue of re-sentencing may be heard by the state trial court as twice ordered by the Ninth Circuit.

ARGUMENT AND REASONS FOR NOT GRANTING THE WRIT

I.

The Petitioner is precluded from bringing this Petition for a Writ of Certiorari due to its procedural default in failing to file a timely and legally sufficient "Amended Petition for Rehearing and Suggestion for Hearing *En Banc*" with the Ninth Circuit Court of Appeals.

It is the position of the defendant that the state is procedurally barred from bringing its Petition for a Writ of Certiorari since it did not file the Petition within 90 days of the judgment of the Court of Appeals [Supreme Court Rule 13.1], or the denial of the Petition for Rehearing. [Supreme Court Rule 13.4]

The Ninth Circuit filed its opinion on September 2, 1993. The state served its Petition for Rehearing on September 21, 1993. The state's Petition was not served within the 14 day deadline as provided by FRAP 40(a). Thereafter, the Court of Appeals entered its Order and Amended Opinion on November 16, 1993. This was merely a technical amendment to the original opinion.

The state then filed its Amended Petition for Rehearing on November 17, 1993. The Court of Appeals entered an Order on December 7, 1993, declaring the state had defaulted as to its "Amended" Petition. Interestingly, the state made no effort to rebut this finding of procedural default by the Court of Appeals and did not request reconsideration of the court's Order. It would

appear that the state waived any objection to the Ninth Circuit's ruling by not requesting reconsideration and by not appealing this issue in its Petition for a Writ of Certiorari. The state also did not object to the entry of the Order of Remand issued by the United States District Court, has not requested a stay of the state proceedings pending a ruling on the pending certiorari petition, and the defendant is now scheduled to be resentenced by the State of Idaho on May 10, 1994.

It is the position of the defendant that the effect of this "default" is to revert back and use the date the original Petition for Rehearing was denied to calculate the state's 90-day period to file the Petition for a Writ of Certiorari. The date the original Petition for Rehearing was denied by the Court of Appeals was November 16, 1993, and the 90-day period to file the Petition for a Writ of Certiorari with this court expired on February 16, 1994. The Petition for a Writ of Certiorari, filed on or about March 3, 1994, was untimely. *See* Missouri v. Jenkins, 110 S.Ct. 1651, 1660 (1990), holding that the provisions of 28 U.S.C. §2101(c) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of judgment below and that the 90-day limits is mandatory and jurisdictional.

The state may argue that December 7, 1993, is the last date which should be used to calculate the 90-day period pursuant to Supreme Court Rule 13.4. However, the Court of Appeals Order of December 7, 1993, cannot be considered an "opinion or decision" date. Rather, the court issued its *judgment* on September 2, 1993, and, thereafter, only made technical amendments to the original judgment. There was no "new judgment, opinion or decision" entered on December 7th upon which to base a new request for rehearing.

But even if there was a new judgment, the state's amended petition for rehearing was faulty and cannot be used to obtain jurisdiction in this court. It has previously been decided that a second, successive or amended petition for rehearing, which does not state new matters of substance, is properly denied by a court of appeals. *See* National Platex Products Co. v. Sun Rubber Co., 276 F.2d 167, 168 (6th.Cir.1960).

The defendant also notes that the state has failed to mention the criteria for accepting certiorari by this court in Supreme Court Rule 10, and that the state has failed to specifically argue why any of the criteria for accepting certiorari would even apply here. This fact is a sufficient basis to deny the Petition.

II.

Whether the Court of Appeals for the Ninth Circuit impermissibly limited the applicability of a procedural bar to habeas review of a death sentence by holding that the Idaho Supreme Court implicitly considered an Eighth Amendment issue not presented to it?

[Listed as Question #1 in state's Petition at page i]

The state argues that the basis of the Ninth Circuit's opinion regarding the defendant's sexual history is "unusual in that it was not a decision on a claim in state proceedings". [See state's Petition at 13] The state further argues that the Ninth Circuit raised the issued on its own motion and that this court must, therefore, decide both failure to exhaust and procedural default issues. The defendant argues in response that the decision below gave full consideration to the issues and decided them correctly. The decision below is correct and the petitioner's argument is without merit.

The Petitioner in its "Petition for Writ of Certiorari" would have this Court believe that the trial judge's conclusions regarding the Respondent's lack of prospects for rehabilitation, based upon his sexual history, were merely "historical background". This is factually incorrect. In reality, it was these "findings" which formed the basis for the *aggravating* circumstances as stated in the "Findings of the Court in Consideration of the Death Penalty Pursuant to Section 19-2515, Idaho Code". A review of the issues offered by the state would only result in a re-examination of factual not legal issues, and in any event, the facts of this case are peculiar and not likely to recur.

It is obvious the trial judge had absolutely no guidance from the Idaho Supreme Court in how to apply the vague statutory circumstances, and resorted to his biased personal beliefs as the basis for the death penalty decision. This open ended approach employed by the trial judge when applying the provisions of Idaho Code § 19-2515 (f), lacked any specific limiting factors, and was similar to the statutes found to be unconstitutional in Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398,100 S.Ct. 1759 (1980), and Maynard v. Cartwright, 486 U.S. 356, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988). Such a record cannot form the basis for the granting of certiorari, and the Ninth Circuit was thoroughly justified in vacating the Respondent's death sentence and remanding for resentencing.

The state incorrectly cites the record at page 8, fn. 2 of its Petition when it claims the "Court of Appeals mischaracterized the trial court's reference to Beam's sexual history, calling it a basis for applying an aggravating factor that was the product of the 'the Court's moral disapproval of Beam's sexual experiences'." In reality, the defendant's sexual history was construed as a

"continuing threat" aggravating factor by the trial judge when he discussed *aggravating* circumstances in support of the death penalty:

> "You lived with people that were on public assistance, food stamps, whatever was necessary to allow you to exist and to satisfy your own personal needs. You have a long history of sexual deviant behavior. It dates clear back, of course, into your early years and early home life. It includes incest, homosexuality, abnormal sexual behavior with women of all ages". [Tr. at 1147-48-Court Findings]
>
> *[See App. at 2-3]*

The State subsequently reduced these comments into "Findings of the Court in Consideration of the Death Penalty". *See* "Petition" at App. 5, paragraph (9). ["Petition" refers to the *Petitioner's* Petition for Writ of Certiorari] Contrary to the Petitioner's attempt to distort the record, the trial court stated in the section entitled *"Facts and Arguments Found in Aggravation"* as follows:

> "9) The prognosis for any substantive rehabilitation is non-existent.
>
> *Defendant has a long history of deviant sexual behavior, including incest, homosexuality, and abnormal sexual relationships with women both older and younger than the defendant."* [emphasis added]

The Ninth Circuit Court of Appeals has rejected the state's attempt to misconstrue the record, finding that this issue was exhausted by the Idaho State court's. These courts based their decisions upon a detailed examination of the record. Now, the state continues to argue that under Idaho Law, issues may not be raised by general reference. Again, the state fails to cite controlling authority by the Idaho Supreme Court, the Ninth Circuit or this court to support its theory.

The state misconstrues the ruling in State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981) at page pages 17-18 of its Petition. Osborn was a capital case decided four years before the defendant's case and resolved the issue of whether Idaho law permits review of issues not objected to below. *Id.* at 192. The court explained that the death penalty is "clearly a different kind of punishment from any other that may be imposed, and I.C. §19-2827 mandates that we examine not only the sentence but the procedure followed in imposing that sentence regardless of whether an appeal is even taken. This indicates to us that we may not ignore unchallenged errors. Moreover, the gravity of a sentence of death and the infrequency with which it is imposed outweighs any rationale that might be proposed to justify refusal to consider errors not objected to below". *Id.* at 192-93.

The Ninth Circuit affirmed a similar argument in Paradis v. Arave, 667 F.Supp. 1361 (D.Idaho 1987, *rev'd on other grounds*, 954 F.2d 1483 (9th Cir. 1992), finding that unchallenged errors in capital cases are "necessarily reviewed pursuant to the Idaho Supreme court's duty found in Idaho Code §19-2827". *667 F.Supp. at 1365.* The Ninth Circuit explained that "[T]he Idaho Supreme Court has the affirmative duty to review the entire record regarding sentencing for both asserted and unasserted errors". *Id.* at 1366.

Here, the record discloses the fact that the defendant had challenged the constitutionality of the (f)(8) "continuing threat" aggravating factor by making specific reference to, and adopting in his briefs, the relevant issues presented in State v. Creech, *infra*, and State v. Sivak, 105 Idaho 900, 674 P.2d 396

(1983)[3]. [*See App. at 4* for a copy of the relevant portion of the Respondent's argument to the Idaho Supreme Court on direct appeal]

The Petitioner would also have this court believe that Wainwright v. Sykes, 433 U.S. 72 (1977), stands for a sweeping rule which would deny the defendant review of his claims by a federal court, absent a showing of cause and prejudice. [See page 17 of state's Petition] The decision in Wainwright does not stand for the proposition the Petitioner proposes.

In Wainwright, the issue concerned the total failure of the defendant to challenge his statements to police, and the failure to request a fact-finding hearing on this issue either before or during trial. *97 S.Ct. at 2500.* In this context, the court considered whether federal habeas review was barred, absent a showing of cause and prejudice. *Id.* at 2506.

The Respondent's case presents a significantly different allegation of a waiver before a state appellate court, but also contains a procedural record indicating the Respondent had properly raised the issue. Neither of these factors were present in Wainwright. Based on this procedural history, the Petitioner's "allegation" of waiver has been rejected by the Ninth Circuit.

The Petitioner has failed to cite legally relevant authority for its position, and has wholly failed to support its legal argument by reference to a favorable

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[3] In Creech, the defendant challenged all portions of Idaho Code §19-2515(f) as being unconstitutionally vague. *670 P.2d at 469.* The Idaho Supreme Court rejected this claim, and other allegations regarding the specific provisions of (f)(6) and (8). *Id.* at 471-72.

In Sivak, the defendant also alleged that each factor in §19-2515(f) was unconstitutionally vague. *105 Idaho at 902.* The court discussed the specific provisions of (f)(5), (6) and (8), referencing the decision in Creech as the basis for denying the constitutional challenge. *Id.* at 904-05.

The decision of the Ninth Circuit failed to mention that all of the (f) factors were challenged in Creech and Sivak, or that its decision was based on only one of the factors challenged by the defendant on appeal, i.e. (f)(6).

factual record. This court should reject the invitation to accept certiorari based on the facts and law applicable to this issue.

The state argues the case of Ylst v. Nunnemaker, 501 U.S. ___ , 111 S.Ct. 2590 (1991), but misstates the rationale of the decision. In Ylst, the defendant was convicted of non-capital murder. He claimed, for the first time on appeal, that a Miranda warning violation had occurred and that his trial counsel's failure to object to adverse psychiatric evidence amounted to ineffective assistance of counsel. *See* 111 S.Ct at 2592. After a series of state and federal appeals, this court granted certiorari to decide the issue of "whether the unexplained denial of a petition for habeas by a state court lifts a state procedural bar imposed on direct appeal so that a state prisoner may then have his case heard on the merits in a federal habeas proceeding". *Id.*

The issue in Ylst is factually distinguishable from the issues in this case. The difference in Beam from Ylst is that in Beam the Idaho Supreme Court was bound by statute and prior case law to decide all issues relevant to the defendant's case, including all issues arising from Aggravating Factors used by the trial judge at sentencing. In Ylst, there was no such requirement.

It is also important to remember that the last state court to review Beam's case denied relief based on its review of all sentencing factors. The Idaho Supreme Court in State v. Beam, 109 Idaho 616, 710 P.2d 526, 534 (1986), in discussing the issue of the aggravating circumstances found by the sentencing judge to justify the imposition of the death penalty, stated:

> "In the sentencing process, the trial court correctly determined the aggravating and mitigating circumstances and found that the mitigating circumstances did not outweigh the gravity of the aggravating circumstances. He correctly imposed the death sentence upon the appellant."

Given this record, and the statutory presumption pursuant to I.C.§ 19-2827 that the Idaho Supreme Court considered the federal claims relating to the issues decided by the Ninth Circuit in Beam I and Beam II, no procedural default may be presumed from the lower court record. *See* Ylst v. Nunnemaker, *supra*, 111 S.Ct. at 2594.

This court should decline to accept the Petition for a Writ of Certiorari filed by the State of Idaho for the reasons stated above.

III.

Whether the Court of Appeals for the Ninth Circuit failed to accord the presumption of correctness mandated by 28 U.S.C. §2254(d) to a state court judgment by holding that the state sentencing judge arbitrarily applied the defendant's sexual history to the sentencing decision?

[Listed as Question #2 in state's Petition at page i]

Procedurally, the state did not raise this issue below when it filed its Petition for Rehearing on September 21, 1993. The question presented by the state is not properly presented by the record and this court should decline to rule on issues not raised below.

As to the merits of this issue, the state appears to argue that if a state court in Idaho makes a statement, then it is beyond the review of the federal courts or even state appellate courts. The state also seems to argue that an absolute presumption of correctness must apply to the trial judge's moral disapproval of the defendant's sexual history when the judge imposes a sentence of death. The defendant argues there is no substantial federal question presented by this issue and the state fails to cite controlling authority for its position. The argument of the state appears to be based more on a policy argument than facts and law.

As a general proposition, the presumption of correctness does not apply to "question of law", or to "mixed questions of law and fact." *See* Miller v. Fenton, 474 U.S. 104, 113-14 (1985).

In the case at bar, the trial judge made a decision, based on facts and law, that the defendant was a "continuing threat" to the community in order to resolve the question of whether the defendant deserved the death penalty. Such a decision involves both legal and factual principles and is not merely a factual finding. There was no "presumption of correctness" for the trial judge's decision on these issues. *See* Parker v. Dugger, 498 U.S. 308, 315, 112 L.Ed.2d 812, 111 S.Ct. 731 (1991).

This court should deny certiorari on this issue for the reasons set forth above.

IV.

Whether the Court of Appeals for the Ninth Circuit improperly devised a "new rule" and applied it retroactively in violation of *Teague v. Lane*, 489 U.S. 288 (1989) by holding that a sentencing court may not consider aspects of a defendant's "sexual history" and by holding that certain sexual behavior is within the protection for primary private conduct afforded by an exception to the non-retroactively doctrine of *Teague*.

[Listed as Question #3 in state's Petition at page i]

The state takes the extraordinary view that an involuntary sexual history which was based primarily upon unfounded allegations but which included evidence that the defendant was the victim of incest, is really evidence of "antisocial" or "socially maladaptive character". [See state's Petition at 21-22]

The state disputes the Ninth Circuit's application of Teague v. Lane, 489 U.S. 288 (1989) and the Ninth Circuit's ruling that the trial court's use of the "continuing threat" [i.e. sexual history] aggravating factor violated the Eighth Amendment. In presenting its argument the state misstates the Ninth Circuit's ruling.

In actual fact, the court held that its ruling was based on Herndon v. Lowry, 301 U.S. 242 (1937), *announced over fifty years ago*, and thus was not a "new rule" within the meaning of Teague. *See* Beam v. Paskett (Beam II), *supra*, at 310. {See Petition at 12 for the state's argument that the Ninth Circuit's rationale was in reality an "alternative theory" for the court's decision} Nothing has been shown by the petitioner to warrant a re-examination this settled legal principle, nor has the state asked for such a re-examination.

Moreover, the Ninth Circuit stated "*Teague's* bar against the application of new rules on a writ of habeas corpus does not apply to 'rules forbidding criminal punishment of certain primary criminal conduct . . . [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense'."[4] [emphasis in original] *Id.*

This language is based on the court's finding that the state was forbidden to impose the death penalty in the defendant's case on the

---

4 In Teague, this court held that new rules of law should not be retroactively applied to cases on collateral review. 109 S.Ct. at 1073. In so ruling, this court also noticed two exceptions: (1) that a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe"; and (2) that a new rule should be applied retroactively if it requires observance of "those procedures that . . . are 'implicit in the concept of ordered liberty' ". *Id.* at 1075. The first exception, if any, applies to this case.

basis of the sentencing judge's subjective, moral disapproval of the primary conduct of the offense and the defendant's involuntary sexual history which was unrelated to a legitimate penological or deterrence goal. Again, the factual record does not support the state's argument and this fact constitutes sufficient cause to deny the Petition.

The state also argues that the court rewrote the factual history of the case since the sentencing judge actually viewed the defendant's sexual history as a mitigating factor rather than an aggravating factor. Again, the state misstates the record.

In the trial court "Findings in Consideration of the Death Penalty", under the heading entitled "FACTS AND ARGUMENT FOUND IN AGGRAVATION", paragraph nine (9), *[See state's Petition at App. 5]*, the trial judge states, in relevant part:

> "9) The prognosis for any substantive rehabilitation is non existent.
>
> *Defendant has a long history of deviant sexual behavior, including incest, homosexuality, and abnormal sexual relationships with women both older and younger than the defendant*". [emphasis added]

How the state can characterize such language as a mitigating factor is beyond comprehension or logic when it is listed under the heading of *aggravating factors* and was used against the defendant as a basis to impose the death penalty. The state cannot rewrite the record to advance its subjective theory of what occurred at sentencing. Again, the factual record does not support the state's argument and this fact constitutes sufficient cause to deny the Petition.

The state concludes this line of argument with the proposition that the Ninth Circuit's reversal of the death penalty, based on the trial

judge's subjective, moral disapproval of the defendant's sexual history, was in reality a "new rule", none of which was based on established precedent which the Idaho Supreme Court could have considered when reviewing the defendant's state appeals. Again, the state fails to cite contrary case law.

In State v. Bainbridge, 698 P.2d 335 (Idaho 1985), decided March 14, 1985, seven months prior to the defendant's decision by the Idaho Supreme Court in October, 1985, the Idaho Supreme Court considered the issue of whether evidence of the defendant's personal sexual history was relevant to a sexual motivation theory for the alleged offense. *Id.* at 340. The court stated that "[G]enerally, evidence of unrelated criminal or immoral activity on the part of a defendant is inadmissible at trial. [citations omitted]" The court went on to comment that evidence of the defendant's past sexual activity may have been admissible pursuant to ER 404(b). *Id.* However, when discussing the evidence the state sought to introduce, the court explained that the state sought to introduce references to Bainbridges' personal sexual habits. The court concluded such evidence was marginal at best and that the prejudice of introducing such evidence outweighed any possible relevance. *Id.*

There was existing precedent for the court to consider when it reviewed the defendant's case, and the review would have necessarily considered the Bainbridge case and this issue. The Ninth Circuit decision follows an unbroken line of state authority and these cases were based on sound principles of state law.

Prior attempts by other courts to use personal background information as aggravation at sentencing have also met with resistance. *See* Dawson v.

Delaware, ___ U.S. ___, 117 L.Ed.2d 309, 112 S.Ct. 1093, 1097 (1992), [constitutional error for a sentencing court to consider mere membership in a white racist prison gang as an aggravating factor where such evidence was not relevant to any issue being decided].

The defendant reiterates that this is not a case where the defendant's involuntary sexual history was a relevant sentencing factor. As the Ninth Circuit correctly stated "[U]nder the Eighth Amendment, a state may not make application of the death penalty depend upon a particular characteristic of the offense or the offender if the selection of such a characteristic 'makes no measurable contribution to acceptable goals of punishment'" [citations omitted]. Beam II, *supra,* at 1308. It is inconceivable that the state advocates the subjective, involuntary sexual history of the defendant, who was himself a victim of sexual abuse, could now be used to aggravate the penalty to death. There is no case law which supports such logic. However, the decision of the Ninth Circuit vacating the death sentence was based on established precedent prohibiting the introduction of such biased and discriminatory evidence as an aggravating factor in a death penalty case. The only reason this evidence was used against the defendant was the biased attitudes of the sentencing judge who ignored the law and imposed the death penalty based on his moral disapproval of the defendant's background rather than the facts before him.

The decision to impose a death sentence must be free of arbitrary and subjective factors. In Spaziano v. Florida, 468 U.S. 447, 460 n.7, 82 L.Ed.2d 340, 104 S.Ct. 3154 (1984), the United States Supreme Court considered the general proposition of whether the Florida capital sentencing statute [and all similar state statutes] addressed the fundamental question of whether "a

determination of the appropriate punishment imposed on the individual" had been made. The court stated its "twin objectives" of review in such cases as being "measured, consistent application and fairness to the accused". *468 U.S. at 459.*

The court went on to find that "[I]f a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not". *Id.* at 460. This is a fundamental principle applicable to all state statutory schemes seeking to impose the death penalty, but a principle which Idaho has chosen to ignore. It is the defendant's contention the actions by the trial judge were not a measured, consistent application of existing law and did not demonstrate fairness to the defendant.

The Ninth Circuit believed the defendant's involuntary sexual history indicated "there was *no* evidence before the trial court supporting the existence of a link, close or otherwise, between the facts that he was the victim of incest, had engaged in homosexual activity, or had abnormal sexual relations with women of ages different than himself and the finding of future dangerousness". *See* Beam I, supra, at1572-73 (1992) and Beam II, *supra*, at 1309.

The state seeks to change the fact that the defendant was a *victim* of sexual abuse, and had a non-violent involuntary sexual history, into a "finding" of future dangerousness to support the death penalty. Neither the Idaho Supreme Court nor the Legislature of the State of Idaho have taken such an extreme approach in capital, or even non-

capital cases, and this court should resist the state's invitation to set legislative and judicial policy for the State of Idaho in this instance.

In summary, the Ninth Circuit found that "[A]fter reviewing the record, we are left with the firm conviction that the state court's finding on which it based its conclusion that any single aggravating circumstance was sufficient to warrant Beam's conviction was simply the product of the court's moral disapproval of Beam's sexual experiences. We do not believe the Eighth Amendment permits the state to send a man to his doom on the basis of a sentence that is so tainted with impermissible bias". Beam II, *supra,* at 1310.

The court's entire opinion was based on established legal principles of long duration protecting the right of privacy and association in personal matters, and the refusal to support non-relevant sexual history as an aggravating sentencing factor in a death penalty case. *See* Griswold v. State of Connecticut, 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678, 1682 (1965), and Eisenstadt v. Baird, 405 U.S. 438, 453, 31 L.Ed.2d 349, 92 S.Ct. 1029 (1972).

The decision of the Ninth Circuit does not state a "new rule of law" as the Petitioner would have this court believe. As stated in Teague, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final". *Id.* at 1070. Again, the Petitioner would have this court believe that a sentencing court in a capital case may ignore a record devoid of linkage between the prior, non-violent, involuntary sexual behavior of the defendant and further dangerousness, and then use such a non-violent non-linked prior sexual history as the basis for finding aggravation and imposing the death penalty. Not surprisingly, the Petitioner fails to both frame his argument in this manner or to cite legal authority for a court to act in such a biased and arbitrary fashion.

The Petitioner also cites Bowers v. Hardwick, 478 U.S. 186, 92 L.Ed.2d 140, 106 S.Ct. 2841 (1986) and has previously argued to this court that Bowers stands for the proposition that homosexuals are a present danger to the community. The state has softened its position in its current Petition, but its argument remains faulty and distorts the holding in Bowers.

What Bowers does stand for is that as a class, homosexuals are not a danger to society. It is only homosexual sodomy which is unprotected by the constitution, not the classification of being a homosexual. This court should also recall that there was no evidence that the defendant even was a homosexual, only that the state trial court believed he had engaged in unspecified homosexual acts. How such personal history is relevant as an aggravating factor in a death penalty decision is unexplained by the state's Petition.

But even if this court rules that a new rule was announced by the Ninth Circuit, the rule falls within the first exception in Teague, i.e. that a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the state to proscribe.

Here, the Ninth Circuit believed the defendant's sexual history indicated "there was *no* evidence before the trial court supporting the existence of a link, close or otherwise, between the facts that he was the victim of incest, had engaged in homosexual activity, or had abnormal sexual relations with women of ages different than himself and the finding of future dangerousness". *See* Beam v. Paskett (Beam I), 966 F.2d at 1572-73. Biased attitudes against those who are different than the "norm" advocated by the Petitioner cannot be tolerated in a death penalty decision.

The decision below on this issue was both fair and correct, and the state's arguments are without merit. This court should reject the invitation to accept certiorari based on the facts and law applicable to this issue.

The trial court's reliance on even one statutory aggravating circumstance held to be invalid under federal law required a new sentencing hearing because the Idaho capital sentencing scheme allows the sentencer to weight statutory aggravating circumstances when imposing a death sentence and the Idaho Supreme Court did not and does not perform harmless error analysis or appellate reweighing when there is an error in capital sentencing.

As the Ninth Circuit observed, the elimination of one aggravating factor in a "weighing" state alters the balance, and renders *unreliable* the prior determination that the death penalty is appropriate. *Id.* Here, in addition to the aggravating factors set forth in Idaho Code §19-2515(f), the state trial judge announced a fourth aggravating factor based on the defendant's involuntary sexual history. The trial judge also stated that any one aggravating factor outweighed all the mitigating evidence.

Where a state capital sentencing scheme uses aggravating circumstances to guide the sentencer's discretion and where an aggravating circumstance is held to be invalid on federal grounds, a remand for resentencing is required. *See* Maynard v. Cartwright, *supra*, 100 L.Ed.2d at 382-83. This is exactly the approach the Ninth Circuit has taken in this case.

Recent authority from the United States Supreme Court has expanded upon this analysis. In Clemons v. Mississippi, 494 U.S. 738, 108 L.Ed.2d 725, 110 S.Ct. 1441 (1990), this court held that a statutory aggravating factor, which was part of the state's weighing process and which was invalidated on federal grounds, required a remand unless the record showed the state appellate court which reviewed the sentence of death had either engaged in harmless error analysis or independently reweighed the aggravating and

mitigating circumstances without the invalid circumstance and found the sentence appropriate. *108 L.Ed.2d at 736-742*. See also, Parker v. Dugger, 498 U.S. 308, 112 L.Ed.2d 812, 111 S.Ct. 731, 738-739 (1991); and Sochor v. Florida, *supra*, 112 S.Ct. at 2119.

The Idaho Supreme Court does not, and did not, perform harmless error analysis or appellate reweighing by the cases cited above. The defendant also notes that none of the potential "saving" procedures identified in these cases were performed in this case.

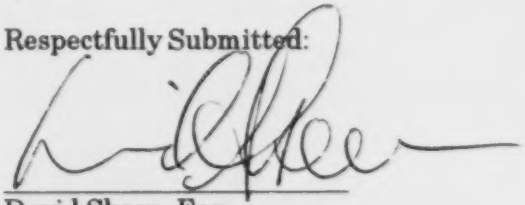
This court should reject the invitation to accept certiorari based on the facts and law applicable to this issue.

CONCLUSION

For the reasons stated above, this court should decline to accept certiorari.

Dated this 23rd day of March, 1994.

Respectfully Submitted:



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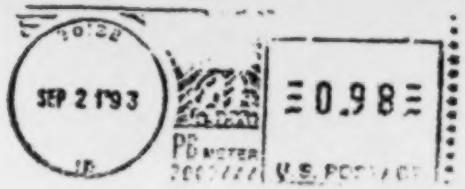
CERTIFICATE OF SERVICE

David Skeen certifies and states that on the 23rd day of March, 1994, he served the following documents: (1) Brief in Opposition to Petition for Writ of Certiorari, upon attorneys for the Petitioner, State of Idaho, by placing a true and correct copy thereof in an envelope addressed as follows: Lynn E. Thomas, Deputy Attorney General, Statehouse, Room 210, Boise, Idaho, 83720, by depositing the same, with postage prepaid, in the United States mails at Port Townsend, WA.

David Skeen

APPENDIX

See attached App. 1 through 4.



App-1

From

State of Idaho
OFFICE OF THE ATTORNEY GENERAL
Larry EchoHawk, Attorney General
Statehouse Room 210
Boise, Idaho 83720-1000

To

DAVID SKEEN
Attorney at Law
1535 Jefferson St.
Port Townsend, WA 98368

of being succes.ful on parole when par.ed , Of course, you were paroled in November of 1982 and this crime was committed in July of 1983, which substantiates their findings.

Again on the 120-day program, which is not that difficult to complete, the primary motivation is to help you to be successful and give you an opportunity before actual incarceration in the Idaho State Penitentiary, you failed, even when it was extended for a period of time.

The prognosis for any substantive rehabilitation is nonexistent. Psychological evaluation describes you as a person who lacks adequate conscience, impulsive and uses others to satisfy your own personal needs. And of course the record is clear that has been your conduct over the period of your life, for whatever reason, to satisfy your sexual needs.

You lived with people that were on public assistance, food stamps, whatever was necessary to allow you to exist and to satisfy your own personal needs. You have a long history of sexual deviant behavior. It dates clear back, of course, into your early years and early home

App-2

life. It includes incest, homosexuality, abnormal-sexual behavior with women of all ages.

The report also shows that you are one that is inclined to use poor judgment and to act out in basic hostility by being abusive to both people and animals. Of course, the record is clear on that, not only what you have done here, but the violence that has been imposed upon some of the women that you lived with, and the behavior that went on manifested itself with the animals. That is beyond explanation, void any type of compassion or feeling, to abuse an animal in the manner in which you have told the presentence investigator.

Because of your learning disabilities and social pathology that is well entrenched, you're described in the presentence as being virtually unemployable. There is no record of employment other than just assisting your father from time to time in the area of mechanics. There was some testimony during the trial of a friend of yours that you were a good cook.

I have taken those things into consideration, but as far as any meaningful employment, I am inclined to agree with the

APP-3

ARGUMENT

I. THE IDAHO DEATH PENALTY PROCEDURE AS ESTABLISHED BY THE LEGISLATURE IS UNCONSTITUTIONAL.

This Court has recently considered full and comprehensive arguments which contend that the death penalty procedures established by the Idaho legislature are unconstitutional. After considering the arguments, and conducting considerable research on its own the Court has determined by a 3-2 margin that the procedures are constitutional as established. The defendant, relying on the dissents by Justices Huntley and Bistline, objected to all phases of the procedures the constitutionality of which have been argued to this Court. And, the trial judge, relying on the majority opinion, overruled the objections. Rather than reiterate in this brief the lengthy and eloquent arguments advanced in State v. Creech, 105 Idaho 362, 670 P.2d 463 (1983); and in State v. Sivak, 105 Idaho 900, 674 P.2d 396 (1983), the defendant adopts those arguments, as well as the arguments advanced in the petition for reconsideration filed in Sivak, and commends them to this Court for reconsideration.

The defendant challenges the constitutionality of the Idaho death penalty procedures on every ground which has been advanced in Creech and Sivak.

The defendant contends that the Idaho Constitution, Article 1, section 7, and the statutes which have been passed to implement that constitutional provision, guarantee to him the right to have a jury pass upon whether he should receive a sentence of death. The defendant urges this Court to consider the position advanced by Justices Huntley and Bistline in